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*Justice Without the State.* LOEWE research focus "Extrajudicial and Judicial Conflict Resolution", 01.11.2012-03.11.2012.

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**Justice Without the State**

In traditional legal thought the concept of justice was intimately connected to state jurisdiction. Both historical investigations as the contemporary trend of globalisation question this connection as being self evident. Legal pluralism, various sources and concepts of justice and different dispute settlement mechanisms operating on different levels are not only a feature of the contemporary globalised and multicultural world, but find many resonances in specific historical contexts. Therefore the LOEWE research focus "Extrajudicial and Judicial Conflict Resolution" organised a workshop with the aim of exploring the concept of justice without the state, both in a historical as in a contemporary perspective.

After the welcoming words of Thomas Duve, Director at the Max Planck Institute for European Legal History, Frankfurt am Main, PETER COLLIN (Frankfurt am Main) presented a systematic introduction elucidating key-concepts to analyze 'justice without the state'. In order to figure out where a certain resolution is to be put in the continuum between informal and formal state-justice, not only the institution and its degree of integration into the state is relevant, but also the question who the decision-makers are, and which rationality is adhered to. Besides contrasting system-related from case-related concepts of justice, Collin raised possible research questions. He asked whether people showed a tendency to choose –if they can – between different institutions of conflict resolution on the basis of which appears the more just institution. Secondly he proposed to investigate the way multi-ethnicity and conflict resolution are interconnected: which tensions arise from normative pluralism? ; or how are disputes between members of different ethnic or cultural groups settled? Collin saw the analysis of diverse and self-regulating social subsystems like economy, science, politics etc. as a third possible challenge. Can we reconstruct the formation of subsystems historically? When can we consider them as autonomous? Does it make sense to talk about subsystemic conceptions of justice? Finally, he thought it might be interesting to explore how the notions of self-government and participation are connected to informal ways of conflict resolution.

SILVIA TELLENBACH (Freiburg) used examples of informal dispute resolution in contemporary Turkey, Iran and Afghanistan to illustrate the complex tensions and interactions between Islamic, secular state- and customary law in the Muslim world. Contrasting concepts of justice emanate from different bodies of law or various social and institutional entities. However, the clash of perceptions is far from restricted to the dichotomy between formal and informal jurisdiction, but has also permeated state law itself, where Islamic legal principles stand aside or manifestly oppose secular ones.

The encounter between native Americans and colonists and the law of harm in the 17th-18th century formed the subject of KATHERIN A. HERMÉS' (Central Connecticut State University) paper. Differentiating three main categories of harm in the colonial era, namely verbal, physical and metaphysical, she depicted a fascinating world of intercultural interaction where the initial phase of Indian participation in legal matters gradually gave way to unilateral dominance of western juridical

norms. By looking into cases as insults, sexual abuse, excessive alcohol consumption, illness or witchcraft, Hermes illustrated how the colonial encounter created problems of conceptual incommensurability and indicated how a changing social reality can imply changing conceptions of law.

LINDA C. REIF (Alberta, Canada) focussed on classical and human rights ombudsman institutions. Whereas the former overcome the state-private sector dichotomy by resolving disputes between private and public actors, the latter also link the transnational human rights system with the national state. Reif listed three conceptions of justice crucial to ombudsman institutions: A) the "legality of administrative conduct" is scrutinised and human rights ombudsman institutions furthermore do this on the basis of concepts of substantive justice; B) "administrative law notions of procedural fairness and justice" and C) broad ethical standards as 'injustice', 'unfairness', or 'proper conduct'. Furthermore, Reif illustrated how ombudsman institutions facilitate the access to administrative justice and provide especially weaker social groups with restorative justice.

JOACHIM ZEKOLL's (Frankfurt am Main) contribution about online dispute resolution showed that the internet is not to be considered as an idiosyncratic space where territory-bound state laws are of no effect, but argued that national borders are re-established in cyberspace. This is apparent not only in the way the flow of information is controlled but also in how disputes are settled by state-based jurisdictional forces. In contrast to eBay, which remains entrenched in state-governed regulations and displays primarily intra-state commercial activity, Zekoll mentioned ICANN's – a Californian non-profit public-benefit corporation – Uniform Domain name Resolution Policy (UDPR) as an exceptional case of transnational and state-independent online conflict resolution, although its scope remains too limited to speak of a paradigmatic case for the appearance of a *lex digitalis*.

Starting from the observation that in the maritime industry traditional trials are giving way to arbitration as a way to resolve conflicts, ANDREAS MAURER (Bremen) contrast the traditional state-based foundations of the law with alternative sources of normativity in the transnational sphere, which are privately created on the basis a participative discourse of all actors involved and often concern a specific industry or social niche. These developments towards legal pluralism should open up conventional legal thought since national law not only loses its hegemonic position, but should also start to envisage ways of evaluating the normative claims of transnational private norms in order to decide whether they could be included in the concept of law.

Drawing from historical as well as contemporary case studies, NIKOLAI KOVALEV (Waterloo, Canada) discussed various ways of how states exert influence on jury trials. Besides overt attempts to restrict jury jurisdiction or their blunt abolition, states have not restrained from interfering in the selection procedure of jurors, nor from manipulating the trial itself or the deliberation of the jury. Specific requirements have been imposed on jury verdicts, which occasionally have been even flagrantly overruled and reversed. Unsurprisingly, the amount of state control over jury trials depends on the legal tradition, as well as on the social and political context.

In dealing with traditional institutions of conflict resolution in Indian Mesoamerican communities PERIG PITROU (Paris) explored how principles of justice belonging to various axiological systems are being used by judges and mediators. Conflicts can be dealt with at different interconnected institutional levels like the family, the village-representatives, state justice and sometimes non-human actors are invoked through sacrificial rites. Recurrent at all levels seems to be the attempt to overcome dyadic antagonism by the insertion of a third and mediating element that defuses the situation or provides a solution or a judgment.

WILFRIED RUDLOFF (Kassel) indicated that the late nineteenth century labour courts in Germany display many features that remind of extrajudicial forms of conflict settlement, although they were part of the state-run jurisdiction. Barristers do not play a part in the process, judges are laymen selected in equal numbers among workers and employers, and chairmen rather function as mediators than as legal experts. Furthermore the right of appeal was severely restricted and a very significant part of the disputes ended in amicable settlement. It seems that the prominence of mediation in these labour courts is intertwined with a procedural notion of justice that led to a process of de-juridification.

A special type of justice without the state are the nineteenth century Prussian manorial courts, elucidated by MONIKA WIENFORT (Berlin). Since the possession of land is the *conditio sine qua non* for the existence of such courts, these are private institutions, which nevertheless are subjected to state control. The manorial justice was largely abandoned by the mid nineteenth century.

An inspiring behavioural perspective on justice and conflict resolution was presented by STEFAN MAGEN (Bochum). After exploring different approaches to answer the question "what is justice" -such as intuitive ethics, equity theory and a modularity of morality-, he drew on game theory to interpret institutions for conflict resolution as revolving around the sustainable achievement of cooperative behaviour between different actors. The decline of voluntary cooperation for instance can be prevented by a well dosed and fair sanctioning of non cooperative behaviour. Magen furthermore launched the conjecture that the degree of formalization of institutions for dispute resolution depends on the nature of the underlying cooperation problem. He thinks that formalized institutions have to be supported by auxiliary social norms and furthermore have the tendency to monopolize dispute resolution.

The diverse insights this workshop brought to the fore, have no doubt provided us with a new analytical toolkit to tackle the question of justice (without the state). It was shown that justice is a multifaceted and equivocal concept. Its ambiguity is not restricted to the state/non-state dichotomy, but has been clearly demonstrated to be inherent to non-state justice as well. Informal justice can for instance both be an indication of modernity, freedom and autonomy – as Zekoll's and Mauer's contibutions might have indicated – but might just as well be a clear sign of failing statehood, as the case of Afghanistan in Tellenbach's exposition seems to attest. Furthermore, basic principles of justice are blurry and context dependent, although fairness quasi seems to be an anthropological constant. Collin's suggestion to speak of a continuum rather than of a clear-cut distinction between formal and informal justice was particularly fruitful. His view was strengthened by the discovery of many hybrids (such as the labour or manorial courts). It seems that law can incorporate more informal ways of dispute resolution. Because of this merging, one could speak of a mimetic relationship between the formal and the informal – to use the concept of the French philosopher René Girard – since a mimetic tension expresses not only antagonism and complementarity, but also, on a deeper and less obvious level, a tendency towards osmosis and mutual absorption.

**Conference Overview**

Welcome and introduction: Thomas Duve and Peter Collin (Frankfurt am Main)

*Different Perspectives of Justice and Conflict Management*

Silvia Tellenbach (Freiburg i.Br.): Islamic Law, Secular Law, and Customary Law – Aspects of a Rich Interrelationship

Stefan Magen (Bochum): A Behavioral Perspective on Justice and Conflict Resolution. Justice-Related Problems of Non-State Conflict Resolution in a Globalized World

Linda C. Reif (Alberta): Changing Conceptions of Justice in Ombudsman Dispute Resolution: From the Classical Ombudsman to the Human Rights Ombudsman Model

Andreas Maurer (Bremen): Vanishing Trails in Maritime Law - why Arbitration Replaces Litigation in the Maritime Industry

Joachim Zekoll (Frankfurt am Main): Online Dispute Resolution – Justice without the State?

*Just Conflict Management in Areas of Limited Statehood*

Katherin A. Hermés (Central Connecticut State University) : Native Americans, the Colonial Encounter, and the Law of Harm, 1600-1787

Perig Pitrou (Paris): Traditional Institutions of Conflict Resolution in Indian Communities of Central America

*Justice without the State within State Structures*

Monika Wienfort (Berlin): Private Courts and Rural Justice in Prussia (1815-1848)

Wilfried Rudloff (Kassel): Justice and Social Reconciliation in the Structure and Rulings of the German Trade Courts in the Late Nineteenth Century

Nikolai Kovalev (Waterloo, Canada): Trial by Jury and State Control: Justice without the State or State without Justice

**URL**: http://www.h-net.org/reviews/showrev.php?id=39757